

Memo: March 12, 2008

To: Albert S. Robinson, Town Counsel

From: Richard H. Brown, Planning Director; Michael Grant, Inspector of Buildings; Meghan C. Jop, Planner;

Subject: Zoning #27 Washington Street

We have been asked to relate our understanding of the application of Wellesley zoning<sup>1</sup> to the National Development proposal for the #27 Washington Street site.

### **Zoning Map**

The property at #27 Washington Street comprises 5.2 acres of land within two zoning districts. The Washington Street frontage to a depth of 180 feet from Washington Street is within a Lower Falls Village Commercial District (LFVC)<sup>2</sup>. The balance of the lot is within an Industrial District A<sup>3</sup>. The entire site is covered by the Residential Incentive Overlay District (RIO)<sup>4</sup>.

### **National Development Project**

National Development has proposed a project consisting of 150 apartment units, including 31 affordable units (under Inclusionary Zoning requirements adopted in 2004) on the rear portion of the site and a two-story commercial building of 33,000 square feet with first floor retail space and second floor office space on the front portion of the site.

### **Zoning as Affecting Housing Component**

Although adopted by the Town ten years ago this is the first application to be considered under the RIO district therefor there is no history to look back to for guidance.

The RIO district was adopted by the town in 1998. Its stated purpose is to “provide a residential reuse incentive (emphasis added) for parcels where one or more of the following conditions apply:

1. general site conditions and access constraints impede long term successful commercial or industrial use;
2. the parcels that border the residential districts and their residential re-use would extend and complement the character and function of the existing surrounding neighborhood;

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<sup>1</sup> Wellesley Zoning Bylaw (ZBL)

<sup>2</sup> Section IXB. of the Zoning Bylaw.

<sup>3</sup> Section XIV. of the Zoning Bylaw.

<sup>4</sup> Section XIVF. of the Zoning Bylaw.

3. the parcels border unique natural features, open space, or historic resources which would be better preserved and enjoyed by the public over the long term through residential rather than commercial or industrial uses.”

It is presumed that one or more of the conditions apply. There has been no question raised either by the Planning Board or the abutters as to whether one or more of the conditions apply. Clearly the property borders the Charles River which is a “unique natural feature.”

Question has been raised as to the housing density limit for the project. To this point we must turn to the recitation of the incentive uses of RIO District. These are enumerated in RIO District (paragraph D) “Permitted Uses: Conventional multi-family dwelling units, assisted elderly living, independent elderly housing, nursing homes and skilled nursing facilities.” There is no mention of “assisted units”<sup>5</sup>. One may presume from this that assisted units are not allowed in a RIO District. However, consideration must be given to two items:

- 1) In RIO District (paragraph C) the second sentence states “The RIO does not in any manner remove or alter the zoning rights permitted by the underlying zoning district.” Such units are permitted uses in the underlying districts. It should be noted that paragraph C seems to allow selection of options at the discretion of the property owner (cafeteria incentive method).

- 2) The Inclusionary Zoning Bylaw (IZBL) post-dates the RIO District<sup>6</sup> and presumably requires a ratio of affordable (assisted) units, based on the underlying zoning<sup>7</sup> according to a formula.<sup>8</sup> For this project the Planning Board determined on November 19, 2007 that 31 affordable units will be required. The IZBL encourages the affordable units to be provided on-site.<sup>9</sup> Even though the RIO

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<sup>5</sup> Assisted Units are defined in the ZBL as Dwelling Units which qualify for enumeration under Chapter 40B, Sections 20-23 M.G.L. (Chapter 774 of the Acts of 1969). In the case of units to be sold there shall be deed restrictions to enforce the funding agencies' requirements for the long term eligibility of the unit for enumeration, and which require that the seller give a 90 day right of first refusal to the Wellesley Housing Authority. The deed restrictions shall be reviewed and approved by the Wellesley Housing Authority and Town Counsel prior to sale.

<sup>6</sup> An argument could be made that Inclusionary Zoning is not required since there is no mention of either the RIO District or the LFVC District in Paragraph B. Applicability of the Section XVIB. And although Industrial A is mentioned the applicant could (under the “cafeteria” nature of RIO District paragraph C) claim no use or applicability of Industrial A provisions or requirements.

<sup>7</sup> Inclusionary Zoning requirements apply to the Lower Falls Village Commercial District and the Industrial District A. It is interesting to note in this context, however, that the applicant did not argue or even suggest that the Inclusionary Zoning does not (might not) apply because RIO is not an enumerated district under the “applicability clause” of XVIB.

<sup>8</sup> Section XVIB. paragraph C. requires 0.02 Assisted Units for each 1,000 square feet of (non-housing) floor space and 0.20 Assisted Units for each dwelling unit in the project.

<sup>9</sup> It does this by stating that if provided on-site there is no IZBL special permit required. If on the other hand the required affordable units are to be provided off-site, in whole or in part, or if the applicant prefers to “cash out” the requirements (make a payment in lieu of providing the units) this requires a special permit.

District does not mention “assisted units” though they may be required by the underlying zoning (Industrial District A<sup>10</sup>) in conjunction with qualifying development projects.

The RIO District sets forth the density requirements for the above described permitted uses but does not set forth the density requirements for “assisted units.” Section XVIII of the ZBL provides the density limits for commercial districts including the LFVC and Industrial A but is silent for the RIO District. The RIO District does, however, provide an overall density limit of 150 units<sup>11</sup>. The proposed project complies with this density limit.

The stated density for “conventional” units is 1800 square feet of lot area per unit. The project is comfortably within this limit which would allow 127 conventional units. The project proposes 119<sup>12</sup> “conventional” units.

Question has been raised as to the “use” of the entire lot for justification of conventional unit density even though a smaller “RIO Development Site Area” has been identified by the applicant. It would seem the ZBL presumes this to be valid in that the only basis for determining density is based on lot area. The identified “RIO Development Site Area” is not a lot for the reasons stated below.<sup>13</sup>

### **Zoning as affecting Commercial Component**

The zoning underlying the RIO District, the Lower Falls Village Commercial District and the Industrial District A allow commercial uses. Among the zoning limitations on a commercial building would be height, setbacks, and square footage. The only aspect that has been challenged is the square footage.

Floor Area Ratio is the ratio of the “floor area of building divided by the commercially zoned lot area.” The established maximum FAR, without a special permit<sup>14</sup>, is 0.30. The lot contains 229,594 square feet. The FAR limit would allow a building of almost 69,000 square feet on the site.

Question has been raised as to the applicant’s ability to exceed an existing zoning limitation of the RIO District (paragraph N) which states that mixed-use RIO projects shall be limited to include no more than 10,000 square feet of “retail” space. Three

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<sup>10</sup> Inclusionary Zoning is not applicable to the LFVC District.

<sup>11</sup> RIO District paragraph H states “...the number of dwelling units on a lot or development site shall not exceed 150 units. ...”

<sup>12</sup> In the case of projects consisting of rental dwelling units compliant with Inclusionary Zoning requirements it could be argued that the “conventional” units are actually “assisted” units. The ZBL defines “assisted units” as “Dwelling Units which qualify for enumeration under Chapter 40B, Sections 20-23 M.G.L. (Chapter 774 of the Acts of 1969). ...” In this case all 150 units would qualify for enumeration. Arguably all of the units in the project are “assisted units” by definition.

<sup>13</sup> Using the entire legal lot in a “passive” way for determining zoning ratios would seem to be supported in Massachusetts Law. see *Tofias et. al. v. Butler et. al.* 523 N.E. 2<sup>nd</sup> 796 (Mass. App. Ct. 1988)

<sup>14</sup> The Planning Board is authorized to issue a special permit in the Lower Falls Village Commercial District to allow an FAR up to 1.0.

points in response are noted. 1) The applicant has chosen to exclude from any RIO “benefit” consideration the Lower Falls Village Commercial portion of the site based on the fact that no RIO elements are within this area. We find nothing in the ZBL that would prohibit this voluntary exclusion. 2) The designation by the applicant of a line on a site plan purporting to designate a “RIO Development Site Area” does not establish a lot within the common meaning of that term or its meaning in the ZBL or under the Subdivision Control Law. In fact read with RIO District (paragraph C) it appears the drafters of the bylaw anticipated the possibility of such a designation.<sup>15</sup> The second sentence of that paragraph states “The RIO does not in any manner remove or alter the zoning rights permitted by the underlying zoning district.” 3) Further to this point the definition of FAR requires that the whole lot be used in the calculation.

### **Project Approval (Section XVIA)**

The National Development project is fully subject to PSI, Design Review and Site Plan Review under the provisions of the Zoning Bylaw. Application has been made for PSI approval and Design Review has been completed. The procedure calls for completion of PSI prior to application for Site Plan Review.

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<sup>15</sup> There are several references within Section XIVF. to “lot or development site” specifically regarding the minimum lot or building site area and minimum open space but providing no further guidance. “Lot or Building Site Area” is referenced in five other multiple family districts of the ZBL. Presumably the intent was to allow, in these other districts, the combination of separate lots for the purposes of aggregating up to the specified “minimum lot or building site area” for the district although interestingly the text that follows the phrase in each case actually would not allow that.